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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. [redacted] 103

MYRPH JOHNSON,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 936

MYRPH JOHNSON,
Petitioner,

V.

THE STATE OF TEXAS,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes Respondent, the State of Texas, and respectfully files its Brief in Opposition to Petition for Writ of Certiorari.

OPINION BELOW

The Court of Criminal Appeals of Texas, the highest court having bail bond forfeiture jurisdiction in Texas, reversed and remanded Petitioner's case on appeal on May 3, 1961. Thereafter that order was withdrawn and on Motion for Rehearing the court delivered a written opinion on June 14, 1961. There was also a dissenting opinion on the Motion for Rehearing which was delivered on June 14, 1961. On the State's second Motion for Rehearing an opinion was delivered dated November 22, 1961. Thereafter

the Petitioner filed a Motion for Rehearing and the court delivered a written opinion concerning this motion on January 17, 1962. Petitioner's second Motion for Rehearing was denied without written order on February 14, 1962. The Court of Criminal Appeals of Texas on February 14, 1962, delivered an order staying issuance of mandate until this Honorable Court acted on the Writ of Certiorari.

JURISDICTION

On appeal from the County Criminal Court of Dallas County, Texas, the case was originally reversed and remanded by the Court of Criminal Appeals of Texas, but this order of May 3, 1961, was withdrawn; and the court's written opinion on the Motion for Rehearing, dated June 14, 1961, held the judgment of forfeiture was excessive by $500.00. The presiding judge of the court delivered on the same day a dissenting opinion. Thereafter, on the State's second Motion for Rehearing, the Court of Criminal Appeals of Texas, in a written opinion dated November 22, 1961, held that the judgment against the Petitioner, Myrph Johnson, and the sureties was valid. On Petitioner's Motion for Rehearing the Court of Criminal Appeals of Texas, in a written opinion dated January 17, 1962, held it was not necessary to give notice to the Petitioner. Petitioner's second Motion for Rehearing was denied without written order on February 14, 1962. An order staying issuance of mandate was issued by the Court of Criminal Appeals of Texas on February 14, 1962, pending Petition for Writ of Certiorari to this Honorable Court. It is questioned by the Respondent that any substantial federal question is presented for adjudication by the Supreme Court of the United States.

QUESTION PRESENTED

Will the Supreme Court of the United States review the presentation of evidence of the trial court, review the inter-

pretation and application of state procedural rules by the highest court in the State of Texas having bail bond forfeiture jurisdiction, and make its own determination of the interpretation and application of these rules, and hold that Petitioner has been deprived of due process of law or equal protection of law under the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Fourteenth Amendment, Section 1, reads in part as follows:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Articles 424, 425, 426, 428, 433, 434, 436, 437, and 438 of Vernon's Code of Criminal Procedure, provides:
Article 424:

> "Whenever a defendant is bound by recognizance or bail bond to appear at any term of a court, and fails to appear on the day set apart for taking up the criminal docket, or any subsequent day when his case comes up for trial, a forfeiture of his recognizance or bail bond shall be taken."

Article 425:

> "Recognizances and bail bonds are forfeited in the following manner: The name of the defendant shall be called distinctly at the court house door, and, if the defendant does not appear within a reasonable time after such call is made, judgment shall be entered that the State of Texas recover of the defendant the amount of money in which he is bound, and of his sureties, the amount of money in which they are respectively bound, which judgment shall state that the same will be made final, unless good cause be shown at the next term of the court why the defendant did not appear."

Article 426:

"After the adjournment of the court, a citation shall issue notifying the sureties of the defendant that the recognizance or bond has been forfeited, and requiring them to appear at the next term of the court and show cause why the same should not be made final. It shall not be necessary to give notice to the defendant."

Article 428:

"Sureties shall be entitled to notice by service of citation, the length of time and in the manner required in civil actions; and the officer executing the citation shall return the same as in civil actions."

Article 433:

"When a forfeiture has been declared upon a recognizance or bail bond, the court or clerk shall docket the case upon the scire facias or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, as defendants; and the proceedings had therein shall be governed by the same rules governing other civil suits."

Article 434:

"At the next term of the court, after the forfeiture of the recognizance or bond, if the sureties have been duly notified, or at the first term of the court after the service of such notice, the sureties may answer in writing and show cause why the defendant did not appear, which answer may be filed within the time limited for answering in other civil actions."

Article 436:

"The following causes, and no other will exonerate the defendant and his sureties from liability upon the forfeiture taken:

"1. That the recognizance or bail bond is, for any cause, not a valid and binding undertaking in law. If it be valid and binding as to the principal, and one

or more of his sureties, they shall not be exonerated from liability because of it being invalid and not binding as to another surety or sureties. If it be invalid and not binding as to the principal, each of the sureties shall be exonerated from liability. If it be valid and binding as to the principal, but not so as to the sureties, the principal shall not be exonerated, but the sureties shall be.

"2. The death of the principal before the forfeiture was taken.

"3. The sickness of the principal or some uncontrollable circumstance which prevents his appearance at court, and it must, in every such case, be shown that his failure to appear arose from no fault on his part. The causes mentioned in this subdivision shall not be deemed sufficient to exonerate the principal and his sureties unless such principal appear before final judgment on the recognizance or bail bond to answer the accusation against him, or show sufficient cause for not so appearing.

"4. Failure to present an indictment or information at the first term of the court which may be held after the principal has been admitted to bail, in case where the party was bound over before indictment or information, and the prosecution has not been continued by order of the court."

Article 437:

"When, upon a trial of the issues presented, no sufficient cause is shown for the failure of the principal to appear, the judgment shall be made final against him and his sureties for the amount in which they are respectively bound; and the same shall be collected by execution as in civil actions. Separate executions shall issue against each party for the amount adjudged against him. The costs shall be equally divided between the sureties, if there be more than one."

Article 438:

"When the sureties have been duly cited and fail to

answer, and the principal also fails to answer within the time limited for answering in other civil actions, the court shall enter judgment final by default."

Article 802 of Vernon's Penal Code of Texas, provides:

Article 802:

"Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley within the limits of an incorporated city, town or village, while such person is intoxicated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor and upon coviction shall be punished by confinement in the county jail for not less than three (3) days nor more than two (2) years, and by a fine of not less than Fifty ($50.00) Dollars nor more than Five Hundred ($500.00) Dollars. Provided, however, than the presiding judge in such cases at his discretion may commute said jail sentence to a probation period of not less than six (6) months."

STATEMENT OF THE CASE

Respondent denies each and every allegation of fact stated by Petitioner in his Petition, except those facts supported by the record and those facts specifically admitted by the Respondent.

This is a criminal bail bond forfeiture case in which Petitioner was charged by affidavit and information (Exhibits "A" and "B") with the offense of driving while intoxicated in violation of Article 802, Vernon's Penal Code of Texas, a misdemeanor offense. Petitioner was arrested on February 18, 1960, as shown by the capias which is attached to this response as Exhibit "C." On the same day, an appearance bond was signed by the Petitioner, and Lee J. Irwin and John R. Bacon as sureties, and approved by the Sheriff of Dallas County, Texas. The Appearance Bond

instanter is attached to this response as Exhibit "D." On March 14, 1960, the case was called and passed for the Defendant as shown by the docket sheet (Exhibit "E"). Mr. Lee J. Irwin on the 10th day of June, 1960, filed an affidavit as surety to be relieved from the bond which is attached to this response as Exhibit "F." On June 22, 1960, the case was called and reset for July 22, 1960, for disposition or bail bond forfeiture as shown by the docket sheet in this cause (Exhibit "E"). The case was called on July 22, 1960, and reset for disposition or bail bond forfeiture on August 26, 1960, as shown by the docket sheet (Exhibit "E"). On August 25, 1960, a judgment nisi was entered, the bond forfeited, and the new bond set at $1,000.00. On June 10, 1960, an alias capias was issued for the Petitioner, and is attached to this response as Exhibit "G." The judgment nisi is attached to this response as Exhibit "H." On September 19, 1960, a bond forfeiture alias capias was issued for the Petitioner and is attached to this response as Exhibit "I." Scire Facias Citation was filed on September 22, 1960, by the two sureties and is attached as Exhibit "J". After the judgment nisi was entered, the Petitioner was re-arrested on November 28, 1960, and on December 5, 1960, Defendant plead guilty to driving while intoxicated as shown by docket sheet (Exhibit "E"), and was sentenced to 30 days in jail and a $50.00 fine; the commitment is attached to this response as Exhibit "K." Petitioner filed a motion to set aside the judgment nisi on December 8, 1960, Exhibit "L" and on the next day filed an amended motion to set the judgment nisi aside (Exhibit "M").

A hearing was held on the bail bond forfeiture by Judge Shelby S. Cox, Judge of the County Criminal Court of Dallas County, Texas, on December 9, 1960, and after the hearing, a final judgment was signed by Judge Cox on December 21, 1960, and is attached to this response as

Exhibit "N." Motion for a new trial was given and the order overruling the Petitioner's and Defendant sureties' motion for a new trial and notice of appeal were entered on December 28, 1960, Exhibit "O." On December 30, 1960, the Petitioner and the two sureties filed a supersedeas appeal bond which was put into effect. The appeal bond is attached as Exhibit "P."

On May 3, 1961, the Court of Criminal Appeals of Texas delivered an opinion which was subsequently withdrawn. On May 17, 1961, the State's Motion for Rehearing was filed withdrawing the May 3 opinion and partially affirming the judgment was delivered on June 14, 1961. The dissenting opinion thereon is attached to this response as Exhibit "R." On June 28, 1961, the State's second Motion for Rehearing was filed and the opinion by the Court of Criminal Appeals of Texas in response thereto was delivered on November 22, 1961, Exhibit "S." On December 6, 1961, the Petitioner's Motion for Rehearing was filed; the opinion of the Court of Criminal Appeals of Texas in response thereto was delivered on January 17, 1962, Exhibit "T." Application for Stay of Mandate was filed by the Petitioner on February 14, 1962, and an order staying the issuance of mandate was issued by the Court of Criminal Appeals of Texas on February 14, 1962—the same date. The order is attached as Exhibit "U." On May 4, 1962, a Petition for Writ of Certiorari was filed by the Petitioner before this Honorable Court. By a letter dated June 22, 1962, the Court notified the Attorney General of Texas that such petition was docketed and requested this office to make response to the application.

Respondent urges that there is no substantial federal question presented for determination by the Supreme Court of the United States.

The Petition now before this Court is replete with asser-

tions that Petitioner was given no notice of the forfeiture hearing; that he was not present during the presentation of the case against said Petitioner; that Petitioner was not present during the presentation of sureties' defense except when he was brought from the jail to testify as a witness; that Petitioner was not advised by the trial court holding the hearing that he was a party to such suit and that Petitioner was not present before the court when the final judgment was rendered against him by the trial court. Each of these allegations has been considered and found to be without merit by the Court of Criminal Appeals of Texas. In the instant case, the exhibits attached hereto render the contentions of the Petitioner to be without merit. Every assertion has been considered and dismissed as lacking substantiality by the Court of Criminal Appeals of Texas or completely contradicted by the evidence here attached. None of the allegations here made are worthy of consideration by this Honorable Court.

ARGUMENT AND AUTHORITIES

Petitioner, in effect, relies on the Fourteenth Amendment of the United States Constitution as a basis of his allegation of deprivation of due process of law. In *Holden v. State*, 158 S.W. 2nd 772, 775 (Tex. Crim. App., 1942, cert. den. 316 U.S. 703, 1942), it was held that when an accused is tried in the state courts, state procedure would be followed. In *Adamson v. California*, 332 U.S. 46 (1947), this court cogently points out that the state may prescribe its own procedures in accordance with its ideas of the most efficient administration of criminal justice.

In order to decide Petitioner's complaints about no notice of the hearing, and that he was not present during the presentation of the case, it will be necessary to check the statutes concerning recognizances and bail bond forfeiture under the Texas statutes and the cases construing the sta-

tutes. Article 426, Vernon's Texas Code of Criminal Procedure, provides:

> "After the adjournment of the court, a citation shall issue notifying the sureties of the defendant that the recognizance or bond has been forfeited, and requiring them to appear at the next term of the court and show cause why the same should not be made final. *It shall not be necessary to give notice to the Defendant.*" (Emphasis added)

Therefore it follows that under Texas law no notice or citation is necessary to be served upon the Defendant in a forfeiture suit concerning a bail bond. In *Western Surety Co. v. United States*, 51 Fed. 2nd 470, (9th Cir., 1931), the court there said on page 472:

> "It is not a prerequisite to the forfeiture of a bail bond that the defendant be notified or that, in the courtroom, he be called to answer. It is his duty to follow the proceedings and to be in court when his presence is required. County of Los Angeles v. Delahunt, 99 Cal. App. 569, 279 P. 187, State v. Holtdorf, 61 Mo. App. 515. Likewise, it is not necessary that notice be given the surety to produce the body of the defendant in court. National Surety Co. v. United States, (C.C.A.) 29 F.2d 92."

This case construes federal law on forfeiture of a bail bond. The Court of Criminal Appeals of Texas, in *Bell v. State*, 186 S.W. 328 (1916) stated the Texas rule when it said:

> ". . . The next article prescribes that citation shall issue to the sureties only, not to the defendant. The reason no notice or citation is to be issued to him, but to his sureties only, is clear and certain. He is a party to the whole proceeding from start to finish by his mere signing the bail bond. His sureties are not, unless they are cited, because the statute is to that effect. Besides, when a defendant willfully forfeits

his bond, he is, or becomes, a fugitive, and it is contemplated in law that no citation can be served upon him, because he cannot be found."

This case follows *Vaughn v. State*, 29 Tex. Rep. 273 and *Curfman v. State*, 195 S.W. 194, (1917) also holds that under the law it is not necessary to serve the principal in a bail bond forfeiture case. Therefore, under Texas law and federal law, it is not necessary that notice be given to the Defendant in a bail bond forfeiture case so that Petitioner's complaint about his being given no notice of the hearing is thus without legal foundation.

In *State v. Wynne*, 181 S.W. 2nd 781, (1944) the court held that it is well settled that an action by the state or federal government on a criminal bail bond is civil, and not criminal, in its nature. This is also followed in *State v. Benedict*, 15 N.W. 2nd 248, (1944), where the court said the ordinary rules pertaining to judgments and civil actions are applicable in actions on bail bonds or recognizances and if the defendant or surety fail to appear a judgment by default may be entered. Thus, it seems that the Petitioner's allegations concern a criminal action and not a civil action due to the fact that under the Texas law as set out in Article 433, Vernon's Texas Code of Criminal Procedure, it provides:

"When a forfeiture has been declared upon a recognizance or bail bond, the court or clerk shall docket the case upon the scire-facies or upon the civil docket, in the name of the State of Texas, as plaintiff, and the principal and his sureties, as defendants; *and the proceedings had therein shall be governed by the same rules governing other civil suits.*" (Emphasis added)

Article 434, Vernon's Texas Code of Criminal Procedure states the time to answer shall be within the time prescribed

in other civil suits. Therefore, a bail bond forfeiture suit is a civil suit under Texas law and civil procedure applies, not criminal procedure.

Next, Petitioner complains that he was not present during the presentation of the case against him. He failed to make it known to anyone that he desired to be present and to participate in the trial. The principal cannot later complain of his failure to assert any privileges he might have after the trial is over. The principal in the case of *Brugemeister v. Anderson,* 259 S.W. 1078 (1924), requested and demanded his privilege to appear and tender issues, which request was specifically denied by the trial court, but reversed by the appellate court. If the Petitioner had filed an answer concerning the bail bond forfeiture proceedings, he would have been entitled to appear, but since he did not, then the rules of civil procedure would apply.

The next allegations of the Petitioner concerning that Petitioner was not present during the presentation of the sureties' defense or that he was not advised by the trial court that he was a party to such hearing and was entitled to counsel; and that he was not present when the final judgment was rendered against him in the trial court thus comes under rules of civil procedure as applied in the State of Texas. Under Texas law the Defendant is not required to be present during any part of the suit unless he wishes to. A default judgment may also be taken without the party being before the court. He is not guaranteed representation unless he wishes to have it and the State does not have to give him a lawyer in a civil proceeding. It seems the Petitioner is trying to bring a bond forfeiture action and its proceeding under criminal law. As is quoted in Article 433, Vernon's Texas Code of Criminal Procedure the proceedings therein are governed by rules of civil procedure, and thus the allegations of Petitioner are not to be

given the test that applies in criminal cases, but given the test that applies in civil actions.

"The federal court should not upset the judgment of the state courts except for the more impelling of reasons essential to preservation of federal constitutional rights." *Henley v. Ellis*, 228 Fed. 2nd 657, 5th Circuit (1956). Here we have on the one side Petitioner's bare self-serving assertions of facts which he claimed resulted in denial of due process. Respondent submits that none of these claims possibly can be accepted as conclusive or even persuasive evidence to compel this Court to give them sufficient credence to support the issuance of a writ of certiorari.

It is apparent that while in the first instance this Honorable Court should not entertain the Petition because the questions have been determined under state procedural rules by the highest court having bail bond forfeiture jurisdiction in Texas, even if the Court should decide to examine the assertions, it is equally clear that no substantial federal question is here presented.

Your Respondent herein submits that the evidence and the law clearly discloses that Petitioner has not been denied due process in any way; that Petitioner did not have to be given notice of the bail bond forfeiture hearing; that he does not have to be present during the presentation of the case against him under Texas civil procedure; that it is not necessary for him to be present during the presentation of his sureties defense; that he does not have to be given counsel or call witness or argue in his behalf concerning his case; and that he does not have to be taken before the trial court when the final judgment is rendered against him because this is a civil suit and a Defendant is not required to be present.

It seems to be the contention of the Petitioner and his

sureties that before the sureties and Petitioner can be held liable on a bail bond forfeiture it would be necessary for the Defendant, or in this case, the Petitioner, to be served with notice of the hearing, and that he would have to be present during the bail bond forfeiture hearing as well as have counsel. If these assertions were correct, a Defendant could skip the country or hide out so that sureties would never be liable under their contract on the bail bond between a state and themselves. The court in *United States v. Davenport*, 266 Fed. 425, held a recognizance in a criminal case is a judgment confessed of record, and a proceeding thereon by scire facias after forfeiture is merely to confirm such judgment.

Respondent respectfully avers that the record and the law before this Honorable Court conclusively show that Petitioner has been afforded all the aspects of due process of law and that the judgment on the bail bond forfeiture violates no provisions of the United States Constitution. Respondent respectfully urges that the Writ be denied in this case.

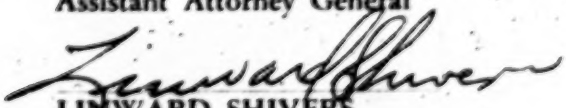
CONCLUSION

Respondent respectfully submits that Petitioner does not allege a substantial federal question; that his assertions lack merit and are of a frivolous nature; that such allegations involve controverted fact issues and have been resolved against Petitioner by the highest state court having jurisdiction in bail bond forfeiture cases, and that for the foregoing reasons this Petition for Writ of Certiorari be denied.

Respectfully submitted,

WILL WILSON
Attorney General of Texas

SAM R. WILSON
Assistant Attorney General



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ATTORNEYS FOR
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THE STATE OF TEXAS

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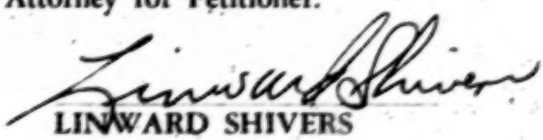
CERTIFICATE OF SERVICE

I, Linward Shivers, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, do now enter my appearance in the Supreme Court of the United States in the above captioned cause, on behalf of the Respondent; I do further certify that a copy of the foregoing Brief has been forwarded by United States Mail, First Class, Postage Prepaid, to T. K. Irwin, Jr., Irwin & Irwin, Attorneys, 215 Mercantile Continental Building, Dallas, Texas, Attorney for Petitioner.



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